UMBC FINANCE BHD.

v.

SYKT. TEKNIKAL & KEJURUTERAAN SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CODE NO. 23-2036-86]
25 MAY 1989

CONTRACT: *Lease agreements - Rentals in instalments - Assignment of rentals - Recourse agreement - Arrears of payment - Repudiation - Novation.*

Prior to 22 October 1982, pursuant to several lease agreements, the 5th defendant leased 8 equipments to the 1st defendant, the rentals for which were to be settled by the 1st defendant in 25 equal instalments commencing 8 March 1981 and settled by 11 April 1984. Payments for such rentals were however assigned to a 3rd party, Associated Pan Malaysia Cement Sdn. Bhd. (APMC), with whom the 1st defendant had a written contract to carry out limestone production works for which the 8 equipments were used. This was evidenced by a deed of assignment.

On 22 October 1982, prior to the expiry of the lease agreements and for which 10 instalment rentals were still due, the plaintiff offered to purchase the same 8 equipments from the 5th defendant and to continue to lease the equipment to the 1st defendant by the creation of a new lease agreement to be executed between the plaintiff and the 1st defendant. Arrangement for this purchase was evidenced by the plaintiff's letter dated 22 October 1982, and it was upon these arrangements that the plaintiff executed 8 equipment lease agreements with the 1st defendant on 28 October, for which payment of all rentals due under the agreements was indemnified by the 5th defendant executing a recourse agreement with the plaintiff wherein the 5th defendant agreed to indemnify the plaintiff against all loss or damage which the plaintiff may sustain as a result of entering into the equipment lease agreement.

On 18 June 1984, APMC, the 1st defendant and the plaintiff agreed to increase the amount of rentals. Then in April 1985, the 1st defendant fell into arrears of payment of rentals and this resulted in the 1st defendant repudiating all the 8 lease agreements with the plaintiff, a repudiation which the plaintiff accepted by terminating all the 8 lease agreements on 11 March 1986 and the 8 equipments have since been sold.

Resulting from such repudiation, the plaintiff turned to the 5th defendant to be indemnified under recourse agreement.

This an appeal by the 5th defendant against an O. 14 summary judgment founded on a recourse agreement dated 28 October 1982, on the grounds that:

(1) They are only liable to meet payment on the 10 instalment rentals due under the first set of lease agreement they had with the 1st defendant and since these instalments have already been paid to account, there is nothing more due from them under the recourse agreement.

(2) There has been a novation to the lease agreements executed by the plaintiff with the 1st defendant, thereby excluding them from any further liability under the recourse agreement.

Held:

[1] Reading clause 5(1), it is clear that the 5th defendant had a primary liability to the plaintiff for any loss suffered by the plaintiff by entering into the 8 equipment lease agreements with the defendants and by adding a clause 17 in the recourse agreement, it only stands to reason that clause 17 was added to signify that the 5th defendant will not only be held liable to the plaintiff for any loss suffered resulting from the lease agreements they have entered with the 1st defendant but also additionally, they are also liable to the plaintiff for the 10 instalments due under the unexpired lease agreements the 5th defendant had with the 1st defendant.

[2] As regards the novation, as no agreement was reached on the re-scheduling programme, the question of whether the lease agreement dated 28 October 1982 have been novated or not does not arise.

[3] The recourse agreement is not a guarantee but a contract of indemnity.

[4] Sums of damages to be assessed by the Senior Assistant Registrar.

[Appeal dismissed.]

For the 5th defendant/appellant - M. Chang; M/s. Suhaimi Khor Zulkifli & Chang
For the plaintiff/respondent - K. Anantham; M/s. Skrine & Co.

JUDGMENT

Siti Norma Yaakob J:

The instant proceeding before me is confined to an appeal by the 5th defendant against an O. 14 summary judgment, founded on a recourse agreement dated 28 October 1982.

Prior to 22 October 1982, pursuant to several lease agreements, the 5th defendant leased 8 equipments to the 1st defendant, the rentals for which were to be settled by the 1st defendant in 25 equal monthly instalments of RM184,704 each, commencing from 8 March 1981 and that by 1 April 1984, all rentals due under the lease agreements would have been settled in full. Payments for such rentals were however assigned to a third party, Associated Pan Malaysia Cement Sdn. Bhd. (APMC), with whom the 1st defendant had a written contract to carry out limestone production works for which the 8 equipments were used. This is evidenced by a deed of assignment dated 4 October 1980, wherein the 1st defendant, the 5th defendant and APMC agreed that APMC would, on behalf of the 1st defendant, pay all rentals due under the lease agreements directly to the 5th defendant from the earning derived out of the limestone production contract which APMC had with the 1st defendant.

On 22 October 1982, prior to the expiry of the lease agreements and for which 10 instalment rentals were still due, the plaintiff offered to purchase the same 8 equipments from the 5th defendant and to continue to lease the equipments to the 1st defendant by the creation of new lease agreements to be executed between the plaintiff and the 1st defendant. Arrangements for this purchase are evidenced by the plaintiff's letter dated 22 October 1982 wherein the parties agree that upon receipt of the remaining 10 instalment rentals due on the unexpired lease agreements from APMC, the 5th defendant would remit the rentals to the plaintiff and that future rentals due on the new lease agreements to be executed by the plaintiff with the 1st defendant would continue to be paid direct by APMC on behalf on the 1st defendant, to the plaintiff, subject to renewals of the yearly limestone contract the 1st defendant had with APMC.

It was upon these arrangements that the plaintiff executed 8 equipment lease agreements with the 1st defendant on 28 October 1982 for which payment of all rentals due under the agreements was indemnified by the 5th defendant executing a recourse agreement with the plaintiff on 28 October 1982 wherein the 5th defendant agreed to indemnify the plaintiff against all loss or damage which the plaintiff may sustain as a result of entering into the equipment lease agreements.

On 18 June 1984, APMC, the 1st defendant and the plaintiff agreed to increase the amount of rentals from RM184,704 to RM282,204 and that APMC would continue paying the new rate of rentals to the plaintiff on behalf of the 1st defendant for as long as the limestone production contract which APMC had with the 1st defendant continues to be renewed yearly.

Then in April 1985, the 1st defendant fell into arrears of payment of rentals and this was largely due to the fact that their limestone production contract was not renewed with APMC. This resulted in the 1st defendant repudiating all the 8 lease agreements with the plaintiff, a repudiation which the plaintiff accepted by terminating all the 8 lease agreements on 11 March 1986 and the 8 equipments have since been sold by the plaintiff at a price of RM15,000 each.

Resulting from such repudiation, the plaintiff has now turned to the defendant to be indemnified under the recourse agreement for all loss suffered as a result of the 1st defendant's breach in the non-payment of the remaining rentals due on the repudiated lease agreements.

Liability is disputed by the 5th defendant on the grounds that:

(1) they are only liable to meet payment on the 10 instalment rentals due under the first set of lease agreements they had with the 1st defendant and since these instalments have already been paid to account, there is nothing more due from them under the recourse agreement.

(2) there has been a novation to the lease agreements executed by the plaintiff with the 1st defendant, thereby excluding them from any further liability under the recourse agreement.

The recourse agreement contains an added clause 17 which reads as follows:

> Notwithstanding anything to the contrary contained herein, this agreement is only in respect of the lease of the equipment and machinery and subject to the terms and conditions of the letter of the lessor to us, reference TLK/NY/HOLF dated 22 October 1982.

It is not disputed that the letter of the lessor dated 22 October 1982 is the plaintiff's letter addressed to the 1st defendant containing terms and conditions relating to the arrangements of the payment of the 10 instalment rentals due on the unexpired lease agreements the 5th defendant had with the 1st defendant and the new lease agreements to be executed by the plaintiff with the 1st defendant following the purchase of the equipments by the plaintiff from the 5th defendant. Under the heading of "guarantee", the 5th defendant have been described as the entity to provide a full recourse, the effect of which is spelt out in clause 5(1) of the recourse agreement wherein the 5th defendant had agreed to indemnify the plaintiff against all loss or damage which the plaintiff may sustain as a result of entering into the lease agreement with third parties which in this case happened to be the 1st defendant regardless of whether or not such loss or damage results from the commission of any breach by the 1st defendant lessee or whether or not the plaintiff has any legal right to claim against the 1st defendant lessee. Reading clause 5(1), it is clear that the 5th defendant had a primary liability to the plaintiff for any loss suffered by the plaintiff by entering into the 8 equipment lease agreements with the 1st defendant. However, the 5th defendant maintain that the

insertion of clause 17 into the recourse agreement has the effect of limiting their liability to meet payment on only the remaining 10 instalment rentals due on the unexpired lease agreements executed by them with the 5th defendant and not for other rentals due under any new lease agreement to be entered into by the plaintiff with the 1st defendant.

I consider that this contention cannot be correct for it indeed that was intended, why was there a necessity to draw up a recourse agreement containing explicit and various terms in the manner it was drawn up and executed. It could have easily been drawn up with only clause 17 as the principal clause governing the intention of the parties.

It must also be remembered that the recourse agreement is not a guarantee but a contract of indemnity and that the plaintiff had specifically asked for such a contract of indemnity because of the very nature of the transaction that the plaintiff were entering with the 5th defendant.

The equipments in question originally belonged to the 5th defendant, who are the dealers and who are more conversant with the manufacture and uses of such equipment. As such they are in a better position than the plaintiff to warrant the capabilities and usefulness of such equipments. The plaintiff, who had decided to purchase the equipments are only the financiers in this transaction and they derive their benefit by leasing the equipments to the 1st defendant. Beyond that they cannot provide any warranty for such equipments and it is to fill their inadequecy for the capabilities of the equipments that the plaintiff had turn to the 5th defendant to provide them with a recourse agreement.

With those factors in mind, I cannot accept the 5th defendant's contention that their liability is only confined to clause 17 relating to the payment of the 10 instalment rentals. Perhaps the words "notwithstanding anything to the contrary contained herein", that were used in clause 17, may well be the wrong choice of words used but they do not, I consider, detract or limit the intention of the parties that have been spelt out in the other clauses in the recourse agreement. It only stands to reason that clause 17 was added to signify that the 5th defendant will not only be held liable to the plaintiff for any loss suffered resulting from the lease agreements they have entered with the 1st defendant but also additionally, they are also liable to the plaintiff for the 10 instalments due under the unexpired lease agreements the 5th defendant had with the 1st defendant. Reading the plaintiff's letter of offer dated 22 October 1982, together with the recourse agreement, I do not consider that clause 17 has the effect of limiting the 5th defendant's liability to the plaintiff by payment of only 10 instalment rentals.

As regards the plea of novation, the 5th defendant have claimed that in July 1985, the 1st defendant became indebted to the 5th defendant for RM450,000 being the costs of the spare parts supplied by the 5th defendant to the equipments. Without such spare parts, the 1st defendant were not able to perform their limestone production contract with APMC.

The fact of the 1st defendant's indebtedness to the 5th defendant for such spare parts is not disputed by the plaintiff but what the 5th defendant seek to claim is that when the 1st defendant fell into arrears of payment of rentals due under the lease agreements, the plaintiff had agreed to incorporate the costs of the spare parts to the rentals due by the drawing up of a third set of lease agreements. From the documentary evidence, particularly from the plaintiff's letter dated 9 July 1985, the plaintiff were quite agreeable to a rescheduling arrangement whereby all outstanding rentals due from the 1st defendant would include the additional costs for the spare parts, provided the 1st defendant's contract with APMC was also renewed and subject to the 5th defendant agreeing to continue being a recourse guarantor

for the 3rd set of lease agreements to be executed. However, nothing came out from their negotiations to effect such arrangements but nonetheless it is relied upon by the 5th defendant to show that there had been a novation to the terms and conditions contained in the lease agreements dated 28 October 1982.

Here again I cannot accept the 5th defendant's contention as clearly the liability to meet payment for the costs of the spare parts is strictly the 1st defendant's sole responsibility and not the plaintiff's. As such, the plaintiff's agreement to incorporate the costs of the spare parts into the rescheduling programme as regards repayment of the outstanding rentals can only be regarded as a from of assistance the plaintiff was prepared to give in view of the contractual relationship they had with the 1st defendant. However, as no agreement was reached on the rescheduling programme, the question of whether the lease agreements dated 28 October 1982 have been novated or not does not arise. In any event, the 5th defendant can still look to the 1st defendant for the settlement of the costs of the spare parts.

As the above 2 issues were the principal issues raised by the 5th defendant in their further arguments and since I have considered they merit no further consideration whatsoever, I have accordingly dismissed the 5th defendant's appeal on liability for damages with costs subject to such damages being entered for a sum to be assessed by the Senior Assistant Registrar.

Also found at [1990] 1 CLJ 569